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STATE OF WASHINGTON

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No. 83660-4

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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TIMOTHY JACKOWSKI and ERI TAKASE, Husband and Wife,

Appellants,

v.

DAVID BORCHELT and ROBIN BORCHELT, Husband and Wife;  
HAWKINS POE, INC., dba COLDWELL BANKER HAWKINS-POE  
REALTORS; HIMLIE REALTY, INC., VINCE HIMLIE, Broker for  
Windermere Himlie Real Estate, Real Estate Brokers, and ROBERT  
JOHNSON and JEFF CONKLIN, Real Estate Agents

Respondents.

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RESPONDENTS

SUPPLEMENTAL BRIEF OF APPELLANTS JACKOWSKI

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RESPONDENTS

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## I. INTRODUCTION

Defendants Borshelts and Hawkins Poe have sought Supreme Court review of a decision of Division II of the Court of Appeals that held that the economic loss rule applies within limits clearly described by this Court in Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007). Recently, in the cases Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., \_\_\_\_\_ Wn.2d \_\_\_\_\_, 243 P.3d 521, (November 04, 2010) and Eastwood v. Horse Harbor Foundation, Inc., \_\_\_\_\_ W.2d \_\_\_\_\_, 241 P.3d 1256 (November 4, 2010), this Court clarified, recast and limited the economic loss rule as set forth in Alejandre.

The clarification of the economic loss rule urged by the dissent/concurrence in Affiliated and the concurrence in Eastwood is consistent with the position previously advanced by Respondents Jackowski in this case. The Jackowski's argument that the real estate professionals should be liable for professional malpractice despite the economic loss rule is not only consistent with the majority decisions in Affiliated and Eastwood, the matter is now beyond controversy. Affiliated in particular expressly ruled that professional duties, enforceable through the tort of malpractice, are independent duties and are therefore not barred by the economic loss rule (now called the "independent duty doctrine").

The only remaining point of real controversy in this case, after the decisions in Affiliated and Eastwood, is whether equitable contract avoidance remedies are allowed as “independent duty” actions under the independent duty doctrine. Alternatively, if contract avoidance equitable remedies are not sufficiently independent of the contracts they seek to avoid to be “independent duties”, then the remedies could be contractual remedies and therefore allowed as such. This Court has very little left to clarify, after its decisions in Affiliated and Eastwood, but the role of equity in contractual jurisprudence is a dim corner of the law on which this Court could cast some additional light.

## II. SUMMARY OF ARGUMENT

The economic loss rule, before the Court’s recent clarification and limitation of it, barred a plaintiff from recovering *tort* damages in an *action at law* for *purely economic losses* when the parties’ relationship, rights and duties *arise exclusively from and are governed exclusively by contract*. Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007); Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn.2d 406, 745 P.2d 1284 (1987). On this formulation, the economic loss rule does not bar a plaintiff from seeking either a contractual remedy (as an equitable contract avoidance remedy may be) or a remedy under duties that arise because the

defendant owes the plaintiff obligations beyond, in addition to, or unrelated to those imposed solely by contract (as in the case of professional obligations enforced through the tort of professional malpractice and imposed through the common law obligation that professional practice their profession with reasonable care). The Jackowskis agree with Justice Madsen and the Justices who joined her separate opinions that these principles were all that was needed to decide the current case in favor of the Jackowskis (as the Court of Appeals had done) and the Affiliated and Eastwood cases as they were substantively decided. However, given the confusion shown by trial courts arising from the use of the term “economic loss rule”, the Court’s decision to revise the vocabulary used in applying this doctrine is a wise and welcomed change.

Under the new formulation, if the duty to be enforced is independent of the contract, then the independent duty doctrine allows enforcement of that duty without resort to the contract. In other words, if the duty is independent of the contract, then the contract is not relevant to the duty. However, if the duty arises from (is dependent on) the contract, then the party seeking to enforce the duty must rely on contractual remedies. If the duty is dependent on the contract, the contract is key.

In this case, the Jackowskis prevail in either case. All of the remedies sought by the Jackowskis against both the Borshelts and Hawkins Poe can be understood as contractual.—The Jackowskis had a purchase and sale agreement with the Borshelts and a professional services agreement with Hawkins Poe. The Jackowskis seek equitable rescission of the Borschelt contract for fraud. This is an ancient contract-avoidance equitable remedy. It is taught in first year contract law classes. It can fairly be understood to be an equitable, but contractual, remedy. Thus, even though equitable contract avoidance remedies are not found in the wording of the contract, they are nonetheless contract remedies that survive the application of either the renamed economic loss rule or the independent duty doctrine.

Alternatively, equitable contract remedies, because they do not arise from the specific terms of a contract, but rather arise from hundreds of years of equitable common law, may be interpreted as being independent duties and therefore applicable as noncontractual under the independent duty doctrine. This would make good sense. The result of the successful application of equitable contract avoidance remedies is the avoidance of the contract. The contract ceases to be applicable and the Court acts instead to restore the status quo ante to the contract.

Similarly, when a professional agrees to provide professional services, they agree to do more than merely finish the scope of work listed in the contract. Professionals are bound by legal standards, most notably the duty to perform with reasonable professional care. Failure to do so is the basis for a professional malpractice claim. However, as with equitable remedies, those professional standards can be understood as either being contractual or noncontractual in nature. They could be interpreted as implied-in-law terms of the professional contract, so an action for breach of them (malpractice) can be understood to be a contractual, not a tort, cause of action. Alternatively, they could be interpreted to arise independent of the contracts, from the body of law regulating professional practice. This second interpretation is preferable because it is the theory on which modern professional malpractice insurance is based. This Court appropriately followed this second interpretation in the Affiliated case.

### **III. ARGUMENT**

#### **A. Professional Obligations are Independent of Contract**

In Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., \_\_\_\_\_ Wn.2d \_\_\_\_\_, 243 P.3d 521, (November 04, 2010), this Court ruled that, in the context of a fire on a monorail, an engineer's liability for professional malpractice arose from duties that were



independent of the contract and therefore not barred under the economic loss rule (now called the independent duty doctrine). In that decision, the Court distinguished, but did not overrule, its previous case of Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994), which appears to come to a different conclusion.

In drawing the finespun distinction between the cases, this Court focused on the danger of fire and ruled that public safety concerns provided an appropriate foundation on which to rest a professional duty independent of the contract on the facts of the Affiliated case. Arguably, real estate agent errors are not as dangerous and therefore real estate agent liability should be subject to the limitations applied in Berschauer/Phillips.

However, this argument fails to recognize a critical difference between the professional obligations of design professionals and those of real estate agents. Engineers and similar design professionals do not have clear, statutorily-defined professional duties to people other than their customers. Arguably, this means that a design professional's professional obligations are generally limited to their contractual relationships, extending beyond contract only under exceptional circumstances, such as those in the Affiliated case.

However, real estate agents professional duties are not so limited. In fact, real estate agents owe express duties to both the buyer and the seller in a real estate transaction even if the agent only has a professional relationship and a contract with one of them. RCW 18.86.030. The Windermere defendants, for instance, owe professional real estate agent duties to the Jackowskis even though they represented and had a contract with the Borschelts, and not the Jackowskis. Thus, unlike engineer duties, which are not inherently independent of contract, real estate agent duties, as defined by statute, are inherently independent of contract. Therefore, a claim for malpractice based on an agent's failure to satisfy those duties arises from a source independent of the contract and is actionable, without contractual limitation, under the independent duty doctrine.

**B. Equitable Contract Avoidance Rights are Either Contractual or Independent of Contract**

While this Court's ruling in Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., \_\_\_\_\_ Wn.2d \_\_\_\_\_, 243 P.3d 521, (November 4, 2010) and Eastwood v. Horse Harbor Foundation, Inc., \_\_\_\_\_ Wn.2d \_\_\_\_\_, 241 P.3d 1256 (November 4, 2010) clarified and simplified the law with regard to professional malpractice case, such as the Jackowski's claims against the real estate defendants in this case,

they may have had the (unintended) effect of obscuring the proper application of ancient equitable principles in the contract context. Under the economic loss rule, the preservation of equity was clear. The economic loss rule barred a plaintiff from recovering *tort damages* in an *action at law* for purely economic losses when the parties' relationship, rights and duties arise exclusively from and are governed exclusively by contract. Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007); Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn.2d 406, 745 P.2d 1284 (1987). Because an equitable claim does not provide for an award of *tort damages* and because a *claim in equity* is not an *action at law* under the traditional distinction between *law* and *equity*, the economic loss rule provided a clear basis for Jackowski's equitable contract avoidance claim against the Borschelts. However, because a contract cannot be equitably avoided unless there is a contract to avoid, these equitable rights may be conceived as being dependent on, not independent of, the contract. However, because these rights do not involve a strict application of the contract terms (resulting rather in the avoidance of such an application), the independent duty doctrine may cause a confusion in equity similar to the confusion in law that resulted from the economic loss rule. This Court should clarify the doctrine to prevent this.

There are three alternative interpretations of equitable contract rights available to this Court. First, this court can interpret equitable contractual remedies as being dependent on a contract but not arising from it and therefore disallowed in contract cases under a strict interpretation of the contract and limitation of claims to the contract. This is the rule that the Borschelts urged under the economic loss rule, and the Jackowskis expect that the Borschelts will continue to advocate for that rule under the independent duty doctrine. However, such a rule would result in the judicial repudiation of ancient and well-developed equitable principles governing contractual relationships.

Alternatively, this court could rule that equitable contractual remedies are dependent on a contract but, because they result in the avoidance of that contract, are not limited by the interpretation and application of its terms. This Court could also rule that these equitable principles arise from pre-existing legal principles and are therefore independent of any given contract, applying to determine whether there is an enforceable contract to apply, rather than arising from a contract as a defense to it. On either interpretation, the Jackowski's claim against the Borschelts would survive. Either interpretation is preferable to the evisceration of ancient equitable principles urged by the Borschelts.

Finally, either interpretation is compatible with both the old economic loss rule and the reformulation of that rule as the independent duty doctrine.

Equity exists, and should continue to exist, as a safety valve, to preserve justice in hard cases in which a strict application of law would produce a patently unjust result. The Borschelts, having deceived the Jackowskis, through fraud, into purchasing an unsafe house that collapsed shortly after the Jackowskis' purchased it (as the Borschelts' engineer predicted it would if the addition to the house were built where and as the Borschelts built it), are seeking to exploit the law to produce a patently unjust result in this case. The Borschelts are correct in observing, under the economic loss rule and under the independent duty doctrine, that the Jackowskis do not have an adequate remedy at law. However, that should result in the Jackowskis having an equitable remedy, not in the Jackowskis being unjustly deprived of any remedy at all.

This result was clear under the economic loss rule. It is less clear under the independent duty doctrine. However, as the Court intended to clarify the economic loss rule to limit, not expand, its application by the trial courts, this Court should continue the process and clarify that the independent duty doctrine does not overrule ancient equitable principles.

#### IV. CONCLUSION

Division II of the Court of Appeals interpreted the economic loss rule in a manner consistent with the separate opinions of Justice Madsen in Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., \_\_\_\_\_ Wn.2d \_\_\_\_\_, 243 P.3d 521, (November 4, 2010) and Eastwood v. Horse Harbor Foundation, Inc., \_\_\_\_\_ W.2d \_\_\_\_\_, 241 P.3d 1256 (November 4, 2010). Because Justice Madsen's position was more limiting than that of the majority, *a fortiori*, the Court of Appeals' decision should be affirmed under the independent duty doctrine.

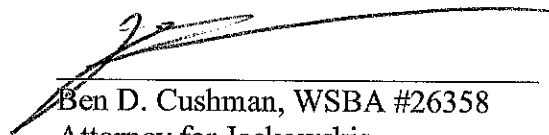
In the case of the real estate defendants, this result would require nothing more than a straight application of the holding in Affiliated coupled with the recognition that the professional duties of real estate agents, as set forth in RCW 18.86.030, are inherently and expressly independent of contract.

However, in clarifying the survival of professional obligations, the recasting of the economic loss rule as the independent duty doctrine may have unintentionally cast doubt on the continuing viability of equity in the contract context. This Court should clarify that equitable contract avoidance remedies are still available in appropriate cases, consistent with the well-established principles set forth in longstanding caselaw.

This Court can preserve equity under the independent duty doctrine in two ways. It can either rule that equitable contract avoidance remedies are independent of contract, being logically prior to any such contract (defining whether or not there is a contract in the first place). Alternatively, this Court can rule that equitable contract avoidance is a contractual remedy that applies despite the contrary implications of a strict application of the terms of the contract (that applies, in fact, to specifically avoid injustices that could result from such a strict application). However, as the Court clarified the law to preserve actions at law which trial courts were inappropriately dismissing under a misinterpretation of the economic loss rule, the Court should clarify the independent duty doctrine to prevent a similar misapplication of it through dismissal of equitable claims.

Respectfully submitted this 7th day of January, 2011.

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**CERTIFICATE OF SERVICE**

BY RONALD R. CARPENTER

Doreen Milward certifies and declares as follows:

I am a paralegal at Cushman Law Offices, P.S. I am over the age of 18, and not a party to this action. On January 7, 2011, I sent the foregoing document for filing with the Court, and sent via e-mail (as previously agreed) and via U.S. Mail, first class postage prepaid, a true and correct copy of this same document to the following:

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